Absent any demonstrated abuse in the area of technician training, the ICs concerns are speculative and premature. Their requested relief even more so. It should be rejected.

X. THE MONTHLY MAINTENANCE CHARGE FOR POWER CABLE IS APPROPRIATE AND REASONABLE

ELI questions the need to charge monthly maintenance for power cable.[47] ELI has not demonstrated the impropriety of such charge. For the reasons discussed below, it should be permitted to remain, as is.

Applying maintenance "factors" to investment (like power cable) is a standard cost methodology for U S WEST and the industry. Factors are typically used as surrogates for estimating costs, for the simple reason that it is not practical to do it any other way.

A maintenance factor is intended to recover all maintenance costs on the average for all investments in an account. By applying a factor uniformly across all investments, U S WEST is made whole in the recovery of all maintenance dollars expended annually for that account.

Although some investments in that account may then appear overstated in "actual" maintenance dollars, others are understated. This is a natural byproduct of using averages and factors. ELI has not shown the unreasonableness of this

[47] ELI at 12.

practice. And, given its general acceptance and use in the industry, the use of the practice should not be disturbed.

XI. CROSS-CONNECT CHARGES

A. U S WEST'S Inclusion Of Repeaters In Our VEIC Rates Is Reasonable

ELI argues that U S WEST should have provided information in our Direct Case with respect to cross-connection service, despite the absence of any specific Bureau requirement that U S WEST respond to the particular inquiry.[48] This is true, ELI argues, because like SWBT, U S WEST "include[s] repeaters in the cost of its cross-connection services."[49]

The investments for standard DS1 and DS3 and the DS1/DS3 EICTs were broken down, per the Commission's requirements, in U S WEST's Appendix A to our Direct Case, which was filed on October 19, 1995.

On a monthly basis, the weighted material cost for regeneration equipment for DS1 EICT is $.23 and for the DS3 EICT is $1.12. This equipment is only required in one EICT design,[50] where the distance between the IC's network termination to U S WEST's network termination exceeds 655 feet for DS1 and 450

[48] Id. at 8-9. The Phase II Designation Order only required Southwestern Bell Telephone Company ("SWBT") to respond to this inquiry. Phase II Designation Order at ¶ 37.

[49] ELI at 8. ELI there lists an "information requirement" (consisting of five items) which it argues U S WEST should be required to respond to.

[50] As U S WEST has previously stated, originally five designs were developed for the EICT. Only one design included regeneration equipment in the design.

feet for DS3.[51] This design, then, was weighted only 10% of the time and would account for instances where cabling was required between floors to provide the EICT.

Investment for repeaters is not included in any other VEIC rate element. Investment for repeaters **is** included in rates for DS1 services, but **not** for DS3 service. Nor is there any investment for repeaters included in rates for Central Office Connecting Channel ("COCC").

B. It Is Not Appropriate To Compare Charges For EICT With COCC

ELI argues that a COCC and an EICT are "two services with the same functionality;"[52] and that, despite the similarity, U S WEST is pricing the EICT in a way that is "detrimental to competition."[53]

U S WEST does not agree with ELI's analysis on this matter, and we have addressed the matter before.[54] Comparing the COCC service to EICT cross-connect elements in the network is simply not a fair comparison because they are two different services. There are additional investments (reflecting distance differences)

[51] U S WEST provided this information previously in our Transmittal No. 531, U S WEST Tariff F.C.C. No. 5, filed Sep. 1, 1994 and in various subsequent filings discussing and defending that Transmittal. See, e.g., U S WEST Tariff F.C.C. No. 5, §§ 21.1. and 21.3.

[52] ELI at 9-10.

[53] Id. at 9.

[54] See Reply of U S WEST to Petitions to Reject, Suspend and/or Investigate, Transmittal No. 331, U S WEST Tariff F.C.C. No. 1, filed Apr. 5, 1993 at 35-36.

that need to be recovered with an EICT cross-connect element, that do not exist with a COCC.[55]

The investment associated with the COCC consists of a jumper cable which serves to cross-connect U S WEST equipment in close proximity. The COCC is used by U S WEST only to connect two like services ordered and installed at different times by different customers.

U S WEST's tariffed rate for the EICT differs from the COCC because the EICT tariffed rate element recovers the costs of U S WEST's investment for cabling between DSXs and/or digital cross-connect systems, which are specifically dedicated to the VEIC IC. Specific costs associated with the EICT have been provided in previous U S WEST filings.[56]

XII. VEIC BILLING ISSUES

The ALTS notes that U S WEST indicated in our Direct Case that we would be willing to change our VEIC tariff with respect to certain billing functions.[57] It "accepts" our position, provided the actual willingness to change the tariff language is actually converted into action.[58]

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[55] U S WEST developed five designs for the EICT, taking into account various wire cener equipment configurations that would apply to EICT connections. We need to account for the investments associated with these designs through the EICT rate.

[56] See Transmittal No. 531, U S WEST Tariff F.C.C. No. 5, filed Sep. 1, 1994. We also broke down the EICT components in our Appendix A, U S WEST Direct Case.

[57] See ALTS at 29.

[58] Id.

On November 22, 1995, U S WEST plans on filing Transmittal No. 694, which will change our VEIC tariff language to allow the IC to be the customer of record for the IDE and associated fiber optic cable; and will permit a different customer of record for the VEICT.[59]

XIII. U S WEST'S INSURANCE REQUIREMENTS ARE REASONABLE

ALTS continues to object to U S WEST's insurance requirement.[60] It argues that it is immaterial that U S WEST requires third parties generally to carry such insurance when they are in or around U S WEST "premises" (such as manholes). What is material, it argues, is whether U S WEST requires the same kind of coverage from other "carriers" with whom we interconnect.

U S WEST has equivalent requirements for insurance coverage any time that non-U S WEST personnel are working on U S WEST property. U S WEST personnel have practices and procedures that they are required to follow to determine that, in fact, such insurance coverage exists.

The insurance requirements for different situations are not always identical. The extent of the coverage will always depend upon the particular situation involved and the potential for liability. U S WEST has made a determination with respect to VEIC service as to what the proper insurance requirements are. We have

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[59] The customer of record for the IDE will, of course, be required to authorize the connection of another customer of record's EICT to its IDE.

[60] See ALTS at 28.

included those requirements in our tariff. We stand by their reasonableness. And, no one has proven them otherwise.

XIV. DIRECT ASSIGNMENT OF LAND/BUILDING INVESTMENT DOES NOT RESULT IN A DOUBLE RECOVERY OF COSTS

MCI states that "[a]ll of the LECs which offer virtual collocation stated in their Direct Cases that they recover a portion of their building and land costs through direct assignment of these costs to certain virtual collocation rate elements."[61] It argues that "LECs are already recovering these costs through overhead [sic] assigned to both the interconnection elements themselves and other rate elements (e.g., access rates)."[62] MCI complains a "double recover[y]" is occurring.[63]

MCI is incorrect in its assertion that U S WEST applies Land and Building ("L&B") factors twice. We apply central office L&B only once to the investment; and only to the appropriate installed investment. It is appropriate to recover these costs for the EICT because there are L&B requirements for this service.

All EICTs within a serving wire center have L&B space requirements. It is true that U S WEST may not have, at this time, a requirement to immediately add

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[61] MCI at 13 (footnote omitted).

[62] Id.

[63] Id.

additional L&B as a result of an EICT request. However, as more EICTs are added, there will be more L&B requirements.

Instead of using a "stair step'" approach for additional L&B requirements, U S WEST has chosen to average the L&B costs over time. While one EICT alone may not trigger additional L&B requirements, as space is used up, additional L&B will be required. Through the application of central office L&B factors, each piece of equipment bears a portion of the L&B space.

Common overhead loadings do not include any costs for central office L&B. Therefore, the rate reduction of 4.24% for L&B that MCI argues for[64] should not be allowed. MCI has failed to prove any double recovery.

XV. LECS SHOULD NOT BE REQUIRED TO PERMIT ICS TO SELF PROVISION CABLING

ELI argues that ICs should be able to provide the cross-connect cables necessary to perform the cross-connect function; and the power cable necessary to connect to the closed power source that serves the IDE.[65]

U S WEST provides the cross-connect and power cabling in order to expedite the engineering process of the VEIC request, as well as to ensure that only standard central office cabling and connectors are ordered. Before any cabling can be installed, engineering work is required. The cabling for each VEIC job must be

[64] MCI at 16.

[65] See ELI at 9-10.

specially measured/engineered for the specific office and equipment in the office. This engineering work ensures that proper cabling lengths and connectors are ordered.

If an outside contractor were to provide the cabling equipment, the engineering work would still be provided by U S WEST engineers.[66] By U S WEST's providing the cabling, based on the information necessarily in its possession, we in fact reduce cycle time processing as well as chances for error, because the number of hand-off steps are reduced.

Allowing the U S WEST engineering and installation personnel to work together in the installation makes eminent sense. Introducing a "third party IC-supplier" of cable is neither necessary nor economically compelled. Working the U S WEST engineering and installation personnel in a partnership actually expedites the process by eliminating any "middleman" conduct or delay.

XVI. THE MATTER OF ACCESS SERVICE RECORDS ("ASR") SHOULD NOT BE ADDRESSED IN THIS INVESTIGATION

MCI argues that the Commission should "prohibit LECs from requiring that [ICs] write [ASRs] at the DS-1 or DS-0 level when ASRs at the DS-3 level are sufficient."[67]

[66] Of course, then we would expect an argument by ICs that not only should they be able to provide their own cabling, but that their designated contractors should be permitted to enter onto U S WEST's premises for purposes of installing the cable -- undoubtedly the same contractors they want to use to install their IDE.

[67] MCI at 24.

The issue of who should be required to issue an ASR is a matter for consideration under the Phase II Designation Order only to the extent that a LEC treats "ordering . . . of virtual collocation services differently than the ordering . . . of other access services."[68] U S WEST does not do so.

Furthermore, the general matter of who writes ASRs for access services, i.e., the IC or the LEC, is a matter more properly raised and resolved in the Ordering and Billing Forum ("OBF") than in this proceeding.[69]

XVII. THE PARTICULARS OF U S WEST'S NO-COST LEASE TARIFF PROVISION ARE NOT RIPE FOR CONSIDERATION IN THIS INVESTIGATION

ALTS objects to that portion of the current U S WEST VEIC IDE tariff that provides for the transfer of VEIC IDE pursuant to a no-cost lease,[70] because of the fact that title does not transfer under the arrangement. MCI has a similar objection.[71]

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[68] Phase II Designation Order at ¶ 102(a).

[69] Fundamentally, the issue has to do with who should write the orders: the IC or the LEC. Obviously, whoever has the responsibility for the order writing must have personnel to do the job. U S WEST believes that it is the responsibility of the customer to write the ASRs, at all the levels that they require. But, we also believe that this is a matter that should be negotiated at the OBF, where these types of issues traditionally have been negotiated, rather than be the subject of an Commission mandate.

[70] Time Warner argues that the Commission should "[r]equire all LECs to offer $1 sale and repurchase arrangements for IDE." Time Warner at 5. Within the context of Time Warner's filing, U S WEST does not read this as an objection to U S WEST's no-cost lease, but rather an opposition to IDE prices such as those being offered by SWBT, for example.

[71] MCI at 16, n.20. MCI therein argues that the Commission should mandate that U S WEST change its VEIC IDE tariff structure to one that "require[s] interconnectors to sell the equipment for a nominal amount (perhaps $1). Such a modification will clarify that title to the equipment has

This was not the proceeding to raise this issue. And, the subject matter has already been raised and responded to in other appropriate proceedings.[72]

In this proceeding, the Bureau asked no questions about U S WEST's no-cost lease provision.[73] Thus, U S WEST was not required to respond to any Bureau investigative inquiry in this area.[74]

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actually been transferred to US West." As discussed below, MCI's objection to U S WEST's tariff on these grounds is untimely.

More significantly, however, the Bureau should be aware that (as was made clear in the Reply of U S WEST to Various Petitions to Reject or Suspend (at 2-7) filed May 3, 1995,with respect to our Transmittal No. 614, U S WEST Tariff F.C.C. No. 5) U S WEST disagrees with MCI's analysis on the "economics" of $1 sale and repurchase arrangement. The use of a transferred $1 consideration within the context of the IDE transfer is not economical (by any meaning of the term) for U S WEST. That is why we declined to adopt such a model. It would cost U S WEST more money to process a "$1 deal" transaction check, track the dollar for an indeterminate amount of time, and then have the IC reimburse U S WEST when the IC terminates the VEIC service. The no-cost lease option is much less costly. The IC simply fills out the EIC request form and the paperwork is complete. There is no additional need for a bill of sale, checks, etc. Furthermore, there are advantages to U S WEST and the IC from leaving title to the equipment with the IC. The IC remains free to choose financing options for the purchase of the equipment. The IC can determine the appropriate insurance method it wishes to protect its equipment (and in the process control the cost). It does not have third party beneficiary issues with which to deal, since the IC is record owner of the equipment. Furthermore, it makes the matter of warehousing spare equipment more manageable (at least with respect to those ICs that wanted to store the IDE on their premises -- which were many).

[72] See Reply of U S WEST to Various Petitions to Reject or Suspend, Transmittal No. 614, U S WEST Tariff F.C.C. No. 5, filed May 3, 1995 at 2-11.

[73] Undoubtedly, this was because the Bureau constructed the Phase II Designation Order as if U S WEST continued to have older Transmittals in place. See Phase II Designation Order at ¶ 21, n.54; U S WEST Direct Case, Phase II, at 1-10.

[74] U S WEST has already defended our institution of the no-cost lease option in our tariff filing Reply to Various Petitions to Reject or Suspend. See notes 71 and 72, supra. The Bureau, finding that that tariff filing raised issues similar to those under investigation in the current proceeding, wrapped that tariff into the current investigation. See In the Matter of US West Communications, Inc. Revisions to Tariff F.C.C. No. 5, Order, 10 FCC Rcd. 1960 (1994); In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, Order Designating Issues for Investigation, 10 FCC Rcd. 3927 (1995). However, in the current Phase II Designation Order the Bureau made no inquiry into that tariff filing.

Those objecting to our no-cost lease provision have chosen the wrong time and the wrong fora. At the time when U S WEST filed the particular tariff provision, commentors had the opportunity -- and took the opportunity[75] -- to challenge the particular provision. U S WEST responded to those challenges and defended our tariff then.[76] The provision is in effect and is deemed reasonable until proven otherwise in a relevant proceeding.

XVIII. CONCLUSION

For all of the above-stated reasons, the Bureau should reject the oppositions filed against U S WEST's Direct Case. We have provided all the available and relevant information requested by the Bureau and have provided reasonable

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[75] See ALTS at 2, n.1.

[76] Attached to this filing is a copy of U S WEST's Reply to those who opposed our tariff. See notes 71 and 72, supra. That Reply, to the extent that it has any relevance to this proceeding, is incorporated herein by this reference.

explanations for our positions. Have fully performed that which was asked, the objections of the opponents of our Direct Case should be dismissed.

Respectfully submitted,

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Dan L. Poole

November 22, 1995

S+R

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
U S WEST Communications, Inc.	)	Transmittal No. 614
Tariff FCC No. 5	)	

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OFFICE OF SECRETARY

**REPLY OF U S WEST COMMUNICATIONS, INC.
TO VARIOUS PETITIONS TO REJECT OR SUSPEND**

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May 3, 1995

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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**REPLY OF U S WEST COMMUNICATIONS, INC.
TO VARIOUS PETITIONS TO REJECT OR SUSPEND**

I. SUMMARY AND INTRODUCTION

U S WEST Communications, Inc. ("U S WEST") herein responds to those Petitions to Reject or Suspend our Transmittal No. 614,[1] which provides for the transfer of virtual expanded interconnection ("VEIC") interconnector-designated equipment ("IDE") from the Interconnector to ourselves, removing U S WEST as the intermediate purchaser of such equipment. As demonstrated below, none of the petitioners' allegations or objections are sufficient to justify rejecting or suspending U S WEST's Transmittal.[2] As such, U S WEST's VEIC IDE and service tariff should be allowed to go into effect.

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[1] Petitions were filed by Electric Lightwave, Inc. (ELI's filing is identified as a "Petition to Reject in Part, or Alternatively, Suspend and Investigate in Part, Proposed Tariff Revisions"); MFS Communications Company, Inc. (MFS' filing is identified as a "Petition to Reject in Part, or Alternatively, Suspend and Investigate in Part, Proposed Tariff Revisions"); and the Association for Local Telecommunications Services (ALTS' filing is identified as a "Petition for Rejection, or for Suspension and Investigation").

[2] To warrant the extreme remedy of rejection, petitioners must prove that Transmittal No. 614 is unlawful in that it demonstrably conflicts with the Communications Act or a Commission rule, regulation or order. See, e.g., American Broadcasting Companies v. FCC, 663 F.2d 133, 138 (D.C. Cir. 1980) ("ABC v. FCC"); Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971);

II. OBJECTIONS OF PETITIONERS

A. Tariff Terms and Conditions Pertaining to the VEIC Service

1. Relating to Risks Associated With IDE

The ALTS objects to the fact that U S WEST has "disclaim[ed] legal responsibility for almost any aspect of the operation of [IDE]," making specific reference only to two tariff provisions (those dealing with sales taxes and environmental accountability).[3] While the ALTS' objection is clearly too general to warrant a rejection or suspension of U S WEST's proposed tariff provisions, the ALTS is essentially correct in its factual assertion.

There are at least two sound bases for our actions. First, the placement of IDE in our central office is a materially different kind of action than we take with respect to our other common carriage obligations. At the direction of a third-party competitor, U S WEST is required to place tangible physical personal property in our central office. Second, the "dedicated" nature of the IDE means that, regardless of where "paper title" lies, the Interconnector should logically bear more responsibility and risk than would be the case with a more traditional purchaser of

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AT&T Company, 67 FCC 2d 1134, 1157-58 ¶¶ 80-81 (1978), recon. denied, 70 FCC 2d 2031 (1979). To justify suspension of Transmittal No. 614, significant questions of unlawfulness must be raised, and petitioners must demonstrate that immediate and serious harm is likely to occur if the tariff is not suspended. See, e.g., AT&T Communications Revisions to Tariff FCC Nos. 260, 266, 267, 268, 270, 273 and 274; Establishment of Rates and Regulations Applicable to ACCUNET Packet Service, 56 Rad. Reg. (P&F) 2d 1503, 1508 ¶ 18 (1984); ITT World Communications Inc., Amendments to Joint Tariff FCC No. 12 for International Telex Service, 73 FCC 2d 709, 719 ¶ 26 (1979); AT&T, 46 FCC 2d 81, 85-86 ¶¶ 10-12 (1974); see also generally Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963).

[3] ALTS at 1.

generic common carrier service. Where U S WEST is solely responsible for the judgments and decisions involving the purchase and deployment of its own facilities and equipment chosen to provide service, U S WEST bears substantial responsibility with respect to such facilities and equipment. Where those decisions are made by another, that "other" should assume the responsibility associated with those exercised judgments.

The ALTS suggests that U S WEST has employed some kind of surfeit in our tariff filing (a "lease back"), and through that surfeit has attempted to impose terms and conditions that we might otherwise not be able to defend. Thus, for example, the ALTS states that "[t]he use of a 'lease-back' arrangement does not permit US West [sic] to pretend it is somehow not the real owner of the IDE, and to demand the elaborate disclaimers contained in Transmittal No. 614."[4] Furthermore, the ALTS suggests that had U S WEST structured the arrangement so that the transfer of a "$1 nominal lease amount" had occurred, the "passage of legal title" would have been "insure[d]."[5] They press further, arguing that had the passage of "title" occurred, U S WEST's terms and conditions would be deemed to be "fundamentally inconsistent" with the passage of that title.[6]

ALTS is incorrect in all particulars. U S WEST could have, and would have, incorporated the same terms and conditions in any VEIC tariff we filed where the

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[4] Id. at 2 (emphasis in original).

[5] Id. at n.1.

[6] Id. at 2.

IDE is purchased initially by the Interconnector, transferred to us subsequently, and thereafter "dedicated" to the Interconnector's use and disposition. Neither the payment of a "nominal" $1 consideration nor the passage of "paper title" would have circumscribed our ability to initiate terms and conditions that we deemed appropriate to the current circumstance.

The terms and conditions U S WEST is tariffing are fair and reasonable. They are tailored to a company finding itself in a somewhat awkward position where actual "title" of property is fairly irrelevant because the fundamental attributes of beneficial ownership are lodged in some identified third-party beneficiary, i.e., the Interconnector. The dedicated nature of the IDE means that terms and conditions different from other common carrier services are appropriate.

The facts of the local exchange carrier ("LEC")/Interconnector IDE relationship/transaction, whether based on a transfer of equipment for a "nominal" monetary amount or for nothing, provide the basis for the reasonableness of U S WEST's proposed tariff revisions: a LEC has, at most, "paper title" to the IDE, but only so long as the Interconnector says so; a LEC is in exclusive possession of the IDE, but only so long as the Interconnector says so;[7] and the IDE may well be of a type and nature either unfamiliar or not endorsed by the LEC.

Under the circumstances where a LEC has very limited control over the type or kind of equipment purchased (e.g., being able to reject IDE only on limited

[7] Both these assertions assume that the Interconnector is not in breach of the tariff. If so, clearly, the Interconnector's ability to dictate the particulars of the VEIC IDE removal and disposition are more circumscribed. See discussion below at Section II.A.3.

grounds, such as network incompatibility, safety, product defects or lack of quality assurance); does not purchase the equipment at a bona fide market price; does not pay sales taxes on the equipment; cannot exclude others from exercising certain "proprietary rights" (when to change out the equipment, for example); and cannot dispose of or alienate the property at will, there is no "real owner[ship]"[8] by the LEC, regardless of the way in which the transaction is structured. Thus, even if U S WEST had structured the arrangement so that a "nominal" consideration had changed hands, U S WEST's "ownership" interest would have been neither increased nor decreased by the passage of the consideration or the "title." It would only have made more work for us.

U S WEST was motivated by two factors in structuring the VEIC IDE offering as we did, i.e., accommodation to clear customer preference and administrative convenience with respect to our own operations.[9] Therefore, creating "title passage" documents, booking and tracking "nominal considerations" payable and recordable each year, and incurring virtually any additional responsibility with respect to the IDE beyond our maintenance and repair responsibilities were not actions we were interested in assuming. Under the terms

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[8] ALTS at 2.

[9] Compare MFS at 2 ("MFS commends U S West's [sic] decision to allow interconnectors to provide their own equipment. Indeed, U S West's [sic] action appears to be -- at least in part -- a response to MFS' requests for a more reasonably priced and administratively efficient means of obtaining terminating equipment for expanded interconnection. (Emphasis added.) U S West's [sic] action in filing the instant transmittal represents a major step toward establishing fair and reasonable interconnection arrangements.") The value of administrative efficiency is not one to be realized only by the Interconnector. The strongest argument, from a LEC's perspective, for "the $1 deal" is administrative efficiency.

of U S WEST's tariff, the IDE transferred must be bought by the Interconnector; the Interconnector must have paid all relevant and applicable sales taxes (and indemnify U S WEST with respect to such payment); and the Interconnector continues to bear risks associated with the IDE (just as the Interconnector continues to exercise certain "rights"), risks that are clearly insurable ones.[10]

With respect to environmental hazards, whether U S WEST takes exclusive possession of the property or "purchases" it for $1.00, we would demand an environmental assurance before we accepted and took final possession of the property; and we would require an indemnification with respect to any future loss. No other "customer" imposes this kind of "risk" on U S WEST. It is only good business and prudent management to anticipate and address this risk. And, it is appropriate that the "causer" of this "risk" bears the costs of assuring against them, as well as being financially responsible for any monetary damages associated with future realization of those risks. There is clearly nothing patently unlawful about U S WEST's VEIC IDE tariff terms and conditions and they should be permitted to go into effect.

To the extent that the ALTS is concerned that U S WEST framed its tariff the way it did to somehow buttress its appellate challenge,[11] the ALTS can rest

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[10] Under the arrangement outlined by U S WEST's tariff, both U S WEST and the Interconnector have an "insurable" interest in the IDE. Our tariff simply assigns the risk of loss to the Interconnector, a risk that the Interconnector can and should insure against. Furthermore, to the extent that there is any kind of Uniform Commercial Code Article 9 Security interest associated with the IDE, we assume insuring the property would be a requirement.

[11] ALTS at 2.

assured that U S WEST has no such intention. The challenge as currently framed is formidable enough. Facts are facts.

U S WEST is not asking the Interconnector to bear any more, or less, responsibility for the IDE than we would demand if we "owned" it for $1.00. The occupation (or "trespass" to use the ALTS vernacular[12]) involving the equipment is neither advanced nor diminished. Simply stated, U S WEST's tariff is framed the way it is to cut through the balderdash and get to the essentials of the transaction with as less a burden as possible on U S WEST.

2. Liability for Damages

MFS and the ALTS object to the fact that in our proposed tariff U S WEST has restricted our liability for damages to those situations in which we have been grossly negligent or engaged in willful misconduct.[13] MFS opines that "[w]hile such a provision may have been reasonable in the context of a physical collocation arrangement, it is inappropriate when applied to virtual interconnection."[14]

MFS is incorrect that U S WEST's liability provisions are reasonable only within a physical collocation environment and not a VEIC one.[15] The provisions are

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[12] Id.

[13] MFS at 6; ALTS at 2.

[14] MFS at 6.

[15] MFS' arguments are confusing to U S WEST. MFS objected to these liability provisions within the context of our physical collocation offering. See MFS' Petition to Reject or Suspend, Transmittal No. 331 and CC Docket No. 91-141, filed Mar. 17, 1993 at 40-41. We responded then, and incorporate our response by this reference and appended Attachment A (U S WEST Direct Case, CC Docket No. 93-162, filed Aug. 20, 1993, at 129-36), that it would be inappropriate to create a limitation of liability for VEIC service different from our other common carriage offerings. While MFS, in its instant filing does not necessarily accede to our earlier-proffered arguments, it does seem to have undergone a

entirely reasonable within either context, all the more so because the liability provisions are essentially the same as those applicable to U S WEST's other common carriage offerings. There is nothing unlawful about such limitations of liability, in general; and, nothing unlawful about their particular iteration in our Transmittal No. 614.

While MFS is correct that U S WEST has exclusive possession of the IDE, that is a matter directly attributable to the Interconnector's choice. We do not force Interconnectors to put IDE in our central office. When they do, under the theory of the Commission, they are purchasing "common carrier service." Nothing warrants Interconnectors being the beneficiaries of a more generous limitation of liability than every other U S WEST customer. Nor is their any reason that the "costs" of such a benefit should be spread generally across the services purchased by other U S WEST customers.

The Common Carrier Bureau ("Bureau") should decline to prescribe any liability provision different from U S WEST's long-standing provision. Such provision is clearly not patently unlawful. Nor are such provisions unreasonable.

3. Disposal of VEIC IDE Equipment

MFS objects to the fact that U S WEST has reserved to itself the authority to dispose of IDE and retain any proceeds from such disposition, in the event of an

change of heart or a change of strategy with respect to its instant challenge to our liability provisions.

involuntary discontinuance of service.[16] It argues that the provision could result in unjust enrichment to U S WEST and could penalize the Interconnector.

The provision is not unreasonable. In the event of a breach of our tariffs, U S WEST is authorized to discontinue service to customers, including Interconnectors.[17] In such a situation, U S WEST is empowered to dispose of the IDE.

So, we begin with the fact that the Interconnector is in material breach. Such breaches almost always involve the non-payment of tariffed sums due and owing. Added to this revenue loss, U S WEST will incur removal costs and disposition costs, without regard to the ultimate "value" of the equipment removed.

Once removed, all the decisions about disposal of the equipment in the case of involuntary discontinuance or abandonment of service are U S WEST's to make. There is nothing in our tariff that requires that we sell the equipment removed. We might not. What we will do is try to equalize the loss of revenue we have suffered by the breaching Interconnector in the most efficient, most economical manner

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[16] MFS at 7.

[17] MFS expresses some concern over whether or not U S WEST would provide Interconnectors with an opportunity to cure, arguing that equity would require such action. Id. at 7 n.12. Regardless of whether equity would require it, U S WEST's tariffs already provide a time frame for curing tariff breaches. For example, were an Interconnector in default in its payments, U S WEST would "temporarily suspend" the EIC channel termination service and would send the Interconnector a "notice of permanent disconnection." That notice would require full payment of service within a specified period of time (generally 7 days). Only if the breach is not "cured," by the end of the notice period would U S WEST permanently discontinue the service, and take out the IDE. It would undoubtedly be some time after that before U S WEST would "dispose" of the equipment. Thus, an Interconnector would have ample opportunity to resolve the situation, should resolution be what the Interconnector was wanting.

possible. Should we decide to sell the equipment, the decision to do so might not be made for many months.

Were the Bureau to mandate that we turn over the proceeds if we sell the IDE, we would be fully authorized in not selling it and just junking it. To the extent that any value at all can be realized by returning the equipment to the "market," the Bureau should not discourage that route or dampen a LEC's incentives to pursue it via a prohibition against retaining the proceeds of such a sale. U S WEST's tariff is not patently unlawful and it should be permitted to go into effect, as drafted.

4. The Housing of Spare Equipment

The ALTS objects to the fact that U S WEST has "insist[ed]" that it "will not warehouse any maintenance spares."[18] U S WEST is not interested in acting as a warehouse for Interconnector spare equipment, it is as simple as that.[19]

Furthermore, we point to those commentors who objected to our mandating spare equipment purchases when we were going to operate as the purchase agent,

[18] ALTS at 3, citing to U S WEST proposed tariff Section 21.5.4.F.2.

[19] The ALTS suggests that "US West [sic] should not be entitled to prohibit spare storage." Id. at 3. Of course we should. The ALTS seems to forget that we are the property owner, and that our rights in that regard have been vindicated. See Bell Atlantic Telephone Cos., et al. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). See also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). And, unless and until the Commission's Virtual Expanded Interconnection Order is affirmed, requiring any physical "occupation" of LEC property where there is not a clear physical interconnection between that property and a LEC service would be extremely risky from a legal perspective.

arguing that they should be permitted to house spares on their own premises, delivering them to the LEC if and when needed.[20]

Interconnectors cannot have it both ways. Our tariff is, appropriately, written in a manner that reasonably accommodates both U S WEST's and Interconnectors' professed business needs. We are not interested in converting our real estate into an equipment warehouse for Interconnector equipment; and, apparently certain Interconnectors would prefer we not mandate such requirement. The ALTS clearly has not sustained its burden of demonstrating patent unlawfulness with respect to this tariff provision. Nor, given the reasonable differences of opinion on this issue, have they proven the proposed tariff provision unreasonable. ALTS' objections should be dismissed.

B. Objections to Financial Implications of Tariff

1. Overhead Loading Factors

ELI objects to what it deems certain "excessive loading factors applied to [certain of U S WEST's] rate elements -- power cable, equipment bay shelf, engineering, and equipment."[21] Both it and MFS allege that U S WEST should have used a 1.20, rather than a 1.30 overhead loading factor, as prescribed by the

[20] See, e.g., various Petitions filed October 14, 1994 against U S WEST's Transmittal Nos. 530, 531, 536, 537, 538, 539, 548, and 549 and CC Docket No. 91-141: Jones Lightwave, Ltd. ("Petition to Reject Portions of Tariff and to Prescribe Reasonable Rates, Terms and Conditions") at 16-17; and MFS ("Petition for Partial Rejection or Suspension and Investigation, and for Prescription of Tariffed Rates, Terms and Conditions") at 20-21.
[21] ELI at 2.